UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SAMUEL HAYE,	:	
Petitioner	:	
	:	
v.	:	Civil Action No.
	:	3:01 CV 414 (CFD)
JOHN ASHCROFT,	:	
Respondent	:	

RULING ON PETITION FOR HABEAS CORPUS

The petitioner, Samuel Haye ("Haye"), brought this petition for habeas corpus asking the Court to declare him eligible for relief from deportation pursuant to § 212(c) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182(c), as amended by § 511 of the Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 5052, and to remand his case to the Board of Immigration Appeals ("BIA"). A hearing was previously held on the petition.

I. Background

Haye, a native and citizen of Jamaica, was admitted to the United States as a lawful permanent resident on July 16, 1980. On June 22, 1989, after a plea of nolo contendere, Haye was convicted of murder in violation of Connecticut General Statutes § 53a-54a and was sentenced to twenty-five years imprisonment. He is currently in state custody, serving that sentence.

On June 13, 2000, the Immigration and Naturalization Service ("INS") commenced deportation proceedings against Haye on the ground that he was convicted of a crime of violence. Resp. Ex. 4, Notice to Appear. Some time prior to November 8, 2000, Haye made a request for discretionary relief from deportation pursuant to § 212(c) of the Immigration and Nationality Act of

1952 ("INA"), 8 U.S.C. § 1182(c), as amended by § 511 of the Immigration Act of 1990 ("IMMACT"), Pub. L. No. 101-649, § 511, 104 Stat. 5052. Prior to the enactment of § 511(a) of the IMMACT, § 212(c) of the INA provided that:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General . . . .

8 U.S.C. § 1182(c). Section 511(a) of the IMMACT amended § 212(c) in 1990 to provide that an alien convicted of an aggravated felony who has served five years or more in prison is ineligible for such a discretionary waiver. See 8 U.S.C. § 1182(c); Cato v. INS, 84 F.3d 597, 601 (2d Cir. 1996). On November 8, 2000, Haye's request for § 212(c) relief was "pretermitted" by an Immigration Judge on the ground that he served longer than five years in jail and was thus barred by § 511(a) of the IMMACT. Haye appealed that decision to the Board of Immigration Appeals, and that appeal was dismissed on March 5, 2001. The instant petition, and a motion for stay of removal,[1] followed.[2]

Haye makes three arguments in support of his petition. First, he claims that he is not barred by the IMMACT five year bar because he did not make an entry or admission after 1990. Second, he contends that the IMMACT does not apply retroactively. Third, Haye contends that, assuming the

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[1]On October 18, 2001, the motion for stay of removal was denied by this Court, without prejudice, on the basis that the petitioner has not completed his state sentence.

[2]This Court has jurisdiction under 28 U.S.C. § 2241 to hear habeas petitions which allege that a petitioner is in custody in violation of the Constitution or laws of the United States. See Calcano-Martinez v. INS, 533 U.S. 348, 351-52 (2001); Sol v. INS, 274 F.3d 648, 651 (2d Cir. 2001) (habeas review pursuant to § 2241 survives the Antiterrorism and Effective Death Penalty Act ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA")) (citing INS v. St. Cyr, 533 U.S. 289 (2001) and Henderson v. INS, 157 F.3d 106, 122 (2d Cir. 1998)).

IMMACT does apply to him, the INS's delay in beginning removal proceedings prejudiced him by making him ineligible for § 212(c) relief because of the IMMACT five year bar. Haye does not dispute that he had served five years in jail prior to the immigration judge's ruling on his application for § 212(c) relief.[3]

II. Discussion

A. Applicability of the IMMACT to Removal Proceedings

As noted above, § 511(a) of the IMMACT amended § 212(c) to provide that an alien convicted of an aggravated felony who has served five years or more in prison is ineligible for a discretionary waiver. See 8 U.S.C. § 1182(c). Section 511(b) of the IMMACT further provides that the effective date of the amendment "shall apply to admissions occurring after the date of the enactment of this Act." Id.

Haye argues that because he did not leave and enter the United States after 1990, and thus was not "admitted" after the date of the enactment of the IMMACT, § 511(a) does not apply to him. According to Haye, the reference to "admissions" indicates that the five year bar applies only to those in exclusion, rather than removal, proceedings.

Although the literal terms of § 212(c) appear to apply only to resident aliens who had left the United States and were attempting to return, i.e., aliens who were in exclusion proceedings, the Second

[3]The Second Circuit, in Buitrago-Cuesta v. INS, 7 F.3d 291, 296 (2d Cir. 1993), indicated that the measurement of a petitioner's time served in prison includes the time served up until the date of the immigration judge's decision. That is, if a petitioner has served five years in prison as of the immigration judge's decision, he is ineligible for § 212(c) relief, regardless of when he applied for that relief.

Circuit has stated that the section also "permit[s] the Attorney General to waive the grounds for deportation under certain conditions in the case of a lawfully admitted permanent resident in deportation proceedings." St. Cyr v. INS, 229 F.3d 406, 410 (2d Cir. 2000); see also Buitrago-Cuesta v. INS, 7 F.3d 291, 292 (2d Cir. 1993) ("While the statutory language is limited to aliens attempting to reenter the country, we have interpreted § 212(c), as have our sister circuits, to give aliens in deportation proceedings as well as exclusion proceedings the right to apply for a discretionary waiver."); Francis v. INS, 532 F.2d 268, 273 (2d Cir. 1976) ("[f]undamental fairness" dictates that § 212(c) apply to resident aliens in deportation as well as exclusion proceedings). The Second Circuit has also held that § 511 of the IMMACT, which amended § 212(c), likewise applies to both removal and exclusion proceedings. See Buitrago-Cuesta, 7 F.3d at 292 ("Since we have applied § 212(c) to deportation proceedings, § 511 is applicable to deportations as well."); see also Crosswell v. INS, Docket No. 01-2674, 2002 WL 31527917, at *1 (2d Cir. Nov. 6, 2002) (same). Accordingly, § 511(a) of the IMMACT applies to Haye notwithstanding that deportation, rather than exclusion, proceedings were commenced against him.

B. Retroactivity of the IMMACT

The Second Circuit has also held that § 511(a) of the IMMACT applies retroactively. See Buitrago-Cuesta, 7 F.3d at 293-296. In Buitrago-Cuesta, the Second Circuit reasoned that, if § 511 did not apply to aliens convicted of aggravated felonies prior to 1990, its directive would not have affected any action by the Attorney General until 1995, five years from the date of the Act's enactment. See id. at 294. By its terms, the Second Circuit noted, "§ 511 took effect after the date of the enactment of th[e 1990] Act." Id. The court maintained that "the only sensible interpretation is that

Congress intended its directions to the Attorney General to go into effect promptly 'after the date of the enactment.'" Id. Finding that "'it makes small sense that so substantial as stricture should not go into effect for five years from enactment,'" the Second Circuit held that § 511(a) does apply retroactively. Id. (quoting Barreiro v. INS, 989 F.2d 62, 64 (1st Cir. 1993)).

Haye argues, however, the decisions by the Second Circuit and United States Supreme Court in St. Cyr v. INS, 229 F.3d 406 (2d Cir. 2000), aff'd sub nom. INS v. St. Cyr, 533 U.S. 289 (2001), cast doubt on the holding of Buitrago-Cuesta. In St. Cyr, the Supreme Court held that the Antiterrorism and Effective Death Penalty Act ("AEDPA"), and Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), both amendments to the IMMACT, did not apply retroactively. The Court recognized that aliens who made plea agreements before the amendments were enacted "almost certainly relied upon [the likelihood of receiving 212(c) relief] in deciding whether to forgo their right to a trial" and thus, "the elimination of any possibility of § 212(c) relief by [the amendments] have an obvious and severe retroactive effect." St. Cyr, 533 U.S. at 325. Accordingly, the court held that "212(c) relief remains available for aliens . . . whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." Id. at 326. The Court did not state whether the IMMACT, itself, is also retroactive.

Haye argues that retroactive application of the IMMACT, like retroactive application of the AEDPA or IIRIRA, would upset certain expectations of aliens who pled guilty prior to the Act's enactment. However, Buitrago-Cuesta explicitly rejected the argument that Congress could have intended that the IMMACT apply only to those whose crimes or convictions postdated its enactment.

See id. at 294. Moreover, the Court does not find Buitrago-Cuesta to be impaired by either the Second Circuit's decision in St. Cyr v. INS, 229 F.3d 406 (2d Cir. 2000), nor the Supreme Court's decision in INS v. St. Cyr, 533 U.S. 289 (2001). See Crosswell v. INS, Docket No. 01-2674, 2002 WL 31527917, at *1 (2d Cir. Nov. 6, 2002). Accordingly, the Court concludes that § 511 of the IMMACT is retroactive under the circumstances presented here.

C. INS' Commencement of Removal Proceedings

Haye also challenges the timing of the INS's commencement of removal proceedings. He contends that the INS's delay in beginning removal proceedings caused his failure to seek 212(c) relief prior to having spent over five years in prison. However, a challenge to the INS's decision whether and when to commence removal proceedings is not subject to judicial scrutiny. See Reno v. American-Arab Anti-Discrimination Committee et al., 525 U.S. 471, 483-86 (1999). In Reno, the Supreme Court held that 8 U.S.C. § 1252(g) precluded review of the Attorney General's decision to commence proceedings, adjudicate cases, and execute removal orders. See id. Accordingly, the decision when to initiate deportation or removal proceedings is within the discretion of the INS and not subject to judicial review.

III. Conclusion

For the foregoing reasons, the five-year bar of § 511 of the IMMACT applies to Haye and renders him ineligible to seek § 212(c) relief from deportation. Therefore, the petition for habeas corpus [Doc. #1] is DENIED. The Clerk is directed to close the case.

SO ORDERED this ____ day of December 2002, at Hartford, Connecticut.

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CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE